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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/528,082	03/14/2005	Joseph D Mosca		5825

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PATENTIQUE PLLC
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Bellevue, WA 98006

02/23/2009

EXAMINER

BLANCHARD, DAVID J

ART UNIT

PAPER NUMBER

1643

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DELIVERY MODE

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/528,082

Applicant(s)

MOSCA, JOSEPH D

Examiner

David J. Blanchard

Art Unit

1643

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 29 January 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 + 2 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.
NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5. ☒ Applicant's reply has overcome the following rejection(s): See Continuation Sheet.

6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: _____

Claim(s) objected to: _____

Claim(s) rejected: 1-7 and 16-26

Claim(s) withdrawn from consideration: _____

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.

12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____

13. ☐ Other: _____

/David J Blanchard/
Primary Examiner, Art Unit 1643

Continuation of 5. Applicant's reply has overcome the following rejection(s): The rejection of claim 8 under 35 U.S.C. 112, second paragraph, as being indefinite for reciting "tumor-derived" is withdrawn in view of the amendments to the claim. With respect to applicants' remarks regarding the premature position of the "final" status of the previous Office Action, it is noted that applicants' amendment to claim 8 has overcome the rejection. It is also noted that in the Non-Final Office Action mailed 11/30/07, claims 3-5 were rejected under the same grounds and while base claim 1 was inadvertently omitted from the rejection, it recited the same claim language (i.e., "tumor-derived") and clearly was also deficient. The subsequent amendments to the claims filed 5/19/08 deleted the term "tumor-derived" from claims 1 and 3-5 and incorporated this language into dependent claim 8, hence, the previous rejection was applied to claim 8 as amended 5/19/08. Thus, the rejection was applied to claim 8 as amended following the Non-final Office Action mailed 11/30/07 in the interest of compact prosecution. As noted above, claim 8 has been amended to delete the claim language "tumor-derived".

Continuation of 11. does NOT place the application in condition for allowance because:

The rejection of claims 1-7, 16-20 and 23-26 under 35 U.S.C. 102(e) as being anticipated by Hiserodt et al (U.S. 6,277,368 B1, filed 7/24/1997) is maintained.

The response filed 1/29/2009 again states that Hiserodt et al fail to teach the virus or virus-like particles as presently claimed. Applicants' arguments have been fully considered but are not found persuasive. Applicant continues to rely on the recitation of "virus or virus-like particle" where neither the specification nor the claims define the phrase "biologically generated virus or virus-like particle" such that a distinction between the claimed particles and these of the prior art can be determined. Further, the response does not point to the specific claimed features of the claimed virus or virus-like particles that may distinguish from the prior art. The specification discloses that the host cells (e.g., host tumor cells) are genetically modified using retroviral vectors such that the modified cells release the virus-like particles and the prior art also teaches the use of retroviral vectors to genetically modify tumor cells and hence, would also release virus-like particles as presently claimed. Again, Hiserodt et al teach using a viral vector such as adenoviral and retroviral vectors (inclusive to HIV-1 gag vectors), wherein the viral vector is first replicated, and then an entire population of cells may be infected and altered. Thus, the genetically modified tumor cells or infected tumor cells with an adenoviral and retroviral vector as taught by Hiserodt et al are reasonably interpreted to read upon "biologically generated virus or virus-like particle with a cellular membrane from a host cell..." in the absence of the distinguishing characteristics or a definition of the phrase. Applicant is reminded that during patent examination, the pending claims must be "given their broadest reasonable interpretation consistent with the specification." The Federal Circuit's en banc decision in *Phillips v. AWH Corp.*, 415 F.3d 1303, 75 USPQ2d 1321 (Fed. Cir. 2005). Applicant always has the opportunity to amend the claims during prosecution, and broad interpretation by the examiner reduces the possibility that the claim, once issued, will be interpreted more broadly than is justified. In re Prater, 415 F.2d 1393, 1404-05, 162 USPQ 541, 550-51 (CCPA 1969).

For these reasons and those already of record, the rejection is maintained.

The rejection of claims 21-22 under 35 U.S.C. 102(b) as being anticipated by Nawrocki et al (Cancer treatment Reviews, 25:29-46, 1999) is maintained.

The response filed 1/29/2009 states that the prior art teaches the administration of non-tumor cells modified to express various molecules by use of a viral vector and does not teach the administration of a purified virus or a virus-like-particle as presently claimed. It is reiterated that Nawrocki et al teach a method of treating cancer in a subject comprising inducing a cellular immune response involving T cells (i.e., "effector cell immune response") against cancer cells comprising administering autologous or allogenic tumor cells or autologous non-tumor cells (e.g., dendritic cells, fibroblasts, monocytes) modified using a retroviral, non-viral lipid, or adenoviral gene delivery system to express a tumor antigen, a B7 co-stimulatory molecule and a cytokine (see entire document, particularly abstract, pp. 38-41). Thus, the genetically modified cells of Nawrocki et al express an MHC molecule that presents one or more antigens to a T cell and are modified to express a co-stimulatory molecule (e.g., B7 or cytokine), which are reasonably interpreted to read upon "biologically generated virus or virus-like particle with a cellular membrane from a host cell..." in the absence of the distinguishing characteristics or a definition of the phrase. If applicant intends to rely upon the phrase "virus or virus-like particle", applicant is invited to point out the distinguishing features or characteristics that define the claimed "virus or virus-like particle" from the prior art.

For these reasons and those already of record, the rejection is maintained.